

FEDERAL CIRCUIT COURT OF AUSTRALIA

*DHZ16 v MINISTER FOR IMMIGRATION &
ANOR*

[2017] FCCA 1016

Catchwords:

MIGRATION – Protection Visa – whether tribunal’s decision affected by jurisdictional error – s.91WA bogus documents – where no error established in tribunal’s decision – application dismissed.

Legislation:

Migration Act 1958 (Cth), ss.65(1), 91WA, 424AA

Applicant:	DHZ16
First Respondent:	MINISTER FOR IMMIGRATION AND BORDER PROTECTION
Second Respondent:	ADMINISTRATIVE APPEALS TRIBUNAL
File Number:	BRG 1033 of 2016
Judgment of:	Judge Vasta
Hearing date:	15 May 2017
Date of Last Submission:	15 May 2017
Delivered at:	Brisbane
Delivered on:	15 May 2017

REPRESENTATION

Counsel for the Applicant: Ms C.E. McConaughy

Solicitors for the Applicant: Hopgoodganim Lawyers

Solicitors for the Respondent: Sparke Helmore

ORDERS

- (1) That the application filed 7 November 2016 be dismissed.
- (2) That the Applicant pay the Respondent's costs of an incidental to this proceeding fixed in the sum of \$7,206.00 (inclusive of GST).
- (3)
- (4)
- (5)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT BRISBANE

BRG 1033 of 2016

DHZ16

Applicant

And

MINISTER FOR IMMIGRATION AND BORDER PROTECTION

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

(Ex tempore)

1. By application filed on 7 November 2016, the Applicant DHZ16 asked this Court to review a decision of the Administrative Appeals Tribunal that affirmed an earlier decision to not grant a protection visa to DHZ16.
2. The decision of the Tribunal was based around the construction of s.91WA of the *Migration Act 1958* (Cth) (“the Act”). The Tribunal decision explains the law in regards to this matter as they have seen it and has set out the criteria of which the Tribunal has to be convinced.

3. At paragraph 20, the Tribunal notes that under s.65(1) of the Act the Minister must refuse to grant a visa if the grant is prevented by s.91WA.

4. Section 91WA is set out as follows:

“91WA Providing bogus documents or destroying identity documents

(1) The Minister must refuse to grant a protection visa to an applicant for a protection visa if:

(a) the applicant provides a bogus document as evidence of the applicant’s identity, nationality or citizenship; or

(b) the Minister is satisfied that the applicant:

(i) has destroyed or disposed of documentary evidence of the applicant’s identity, nationality or citizenship; or

(ii) has caused such documentary evidence to be destroyed or disposed of.

(2) Subsection (1) does not apply if the Minister is satisfied that the applicant:

(a) has a reasonable explanation for providing the bogus document or for the destruction or disposal of the documentary evidence; and

(b) either:

(i) provides documentary evidence of his or her identity, nationality or citizenship; or

(ii) has taken reasonable steps to provide such evidence.

...”

5. The immediate question that the Tribunal had to look at was whether the Applicant had provided a bogus document as evidence of his identity. What the Applicant did was provide the Department with a birth certificate and certified translation as evidence of his identity.

6. The Tribunal approached this aspect very carefully. They asked the Applicant when it was that he departed Bangladesh. The Applicant

said that he left on 20 February 2013. The Tribunal asked how the Applicant obtained the birth certificate that he provided to the Department. The Applicant replied that it was at his home and that he then received it by email; that home being the home in Bangladesh.

7. However, the birth certificate showed a date of registration of 5 June 2013, which was after the time that the Applicant had left Bangladesh. The Applicant said that the certificate was there before he left Bangladesh and his parents arranged for it to be sent to him by email.
8. The Tribunal again noted that the birth certificate showed a date of registration of 5 June 2013 and a date of issue of 21 July 2013. Both of these dates were after the Applicant departed from Bangladesh. The Tribunal indicated to the Applicant that it might have difficulty accepting that his parents sent him a birth certificate which was at home when he left Bangladesh.
9. The Applicant said that he told his parents to send a copy of the birth certificate that he already had. The Tribunal put a number of matters to the Applicant pursuant to their duty under s.424AA of the Act and, in effect, told the Applicant that they could not accept that this was a true birth certificate.
10. The Tribunal invited the Applicant to put forward any further information giving rise to a reasonable explanation in the event that the Tribunal found that the birth certificate was a bogus document. The Applicant said he could not make any comment as his parents had obtained the birth certificate.
11. The Tribunal asked the Applicant why, at the beginning of the hearing, he had repeatedly stated that his parents had sent him a birth certificate he already had at home before he left Bangladesh. The Applicant then said that it may be that his parents had to then go and find a new birth certificate because they could not find the birth certificate that was there at his house.
12. The Tribunal asked then why he did not say straightaway that his parents had obtained a new birth certificate. After asking this question, the Tribunal noted that they were met with a very lengthy pause.

13. Eventually, the Applicant stated that the discrepancy in the date of his birth year, being 1988 or 1989, was what created the problem. The Tribunal could not accept that this was so.

14. At paragraph 39, the Tribunal said this:

“The Tribunal finds the birth certificate provided to the Department was not issued by the authorities in Bangladesh. Given the UNICEF report, the Tribunal would have expected the applicant’s birth certificate to be capable of verification online using the BRIS website. The Tribunal was unable to verify the birth certificate. No explanation has been provided as to why the applicant’s birth certificate would not have been capable of verification using the BRIS website. The applicant submitted that a birth certificate issued before he departed from Bangladesh might not be included on the online system, but this is not the birth certificate that was provided to the Department. The birth certificate provided to the Department was issued on 21 July 2013, several months after the applicant had departed from Bangladesh. The country information indicates that document fraud is widespread and bogus documents are easily obtainable in Bangladesh. In these circumstances, the Tribunal finds the birth certificate purports to have been, but was not, issued in respect of the applicant, as contemplated by paragraph (a) of the definition of ‘bogus document’ and that such a document is a ‘bogus document’ for the purposes of that definition in s.5(1) of the Act.”

15. The Tribunal then went on to consider whether the Applicant had a reasonable explanation for providing the bogus document. After going through everything that the Applicant had said, the Tribunal found that they were not satisfied that the Applicant “has a reasonable explanation for providing a bogus document to the Department”.

16. Accordingly, consistent with s.91WA of the Act, the Tribunal must affirm the decision to refuse to grant the Applicant a protection visa.

17. What the Tribunal then did was to go through all of the claims that the Applicant had made in any event, notwithstanding that this was not required by the Tribunal. In the end, the Tribunal found that even if the document was not a bogus document, that the Applicant did not satisfy the Refugee Convention criteria, nor the complementary protection criteria.

18. The Applicant in his amended application provided the following grounds:

“1. The Tribunal fell into jurisdictional error by making a purported decision that was manifestly illogical or irrational.

Particulars

(a) The Tribunal stated that the Applicant had not engaged in any political activism since his departure from Bangladesh and that this is a fact which suggests he will not face persecution in future;

(b) The Applicant claims he was taking avoiding action by not engaging in any political activism while in Australia

(c) The Tribunal’s reasons are illogical or irrational because there is authority that persecution does not cease to be persecution for the purposes of the Convention because those persecuted can eliminate the harm by taking avoiding action.

2. The Tribunal fell into jurisdictional error by failing to take into account a relevant consideration.

Particulars

(a) Ministerial Direction No 56 states that decision makers ‘must take into account’ DFAT country information assessments in the course of making a decision;

(b) The Tribunal failed to consider country information before it which included specific relevant examples of the Awami League’s propensity for violence against supporters of the BNP, the politically motivated extortion of businessmen who are supports of the BNP, and the culture of impunity in Bangladesh;

(c) In relation to the BNP, country information provided to the Tribunal in the applicant’s written submissions described how ‘leaders of the business community in Bangladesh requested greater security stating that ‘extortion was one of the major reasons for spiralling crimes, including abductions and killings... such serious crimes in many cases were committed over extortion’. Recent news indicates that a Dhaka businessmen was extorted by police officers, who threatened to implicate him in false cases if he refused to pay up’;

(d) The Tribunal accepted that the applicant was a victim of extortion in his home village in Bangladesh;

(e) In recognizing that the applicant was ‘a low level BNP support’, that the applicant operated a store in Bangladesh and had been a victim of extortion in his home village, the Tribunal failed to consider the country information before it that BNP supporters and business people have been subjected to persecution for a Convention reason.”

19. Ms McConaughy, who appears pro bono for the Applicant, has gone through, in quite a detailed fashion, those grounds. Without wanting to gloss over what it is that Ms McConaughy has raised, those grounds do go mainly to the claims of the Applicant as to the complementary protection or the Refugee Convention criteria.
20. Those grounds do not really look at the bogus document matter. All this Court can do, in looking at the Tribunal decision, is to say whether on the evidence that was before the Tribunal, was such a finding open to the Tribunal.
21. I have concluded that on the evidence it was open and, quite frankly, I do not think there was really any other conclusion open to the Tribunal to find that the documentation, namely, the birth certificate provided by the Applicant was a bogus document.
22. In making that finding, there is no other discretion left in the Tribunal to make any other consideration of the claims of the Applicant.
23. Therefore, I do not find that there is any jurisdictional error and I dismiss the application with costs in the sum of \$7,206.00.

I certify that the preceding twenty-three (23) paragraphs are a true copy of the reasons for judgment of Judge Vasta.

Date: 24 May 2017